



Giant salvinia  
*Salvinia molesta*

# Clean Water Act

## ***What is the Clean Water Act (CWA)?***

CWA is the cornerstone of surface water quality protection in the United States. The statute employs regulatory and nonregulatory tools to achieve the broad goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters so that they can support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. CWA regulatory and nonregulatory tools are used to:

- reduce direct pollutant discharges into waterways
- finance municipal wastewater treatment facilities
- manage polluted runoff

Currently, many of the tools used for surface water quality protection employ the watershed approach, which focuses equally on protecting healthy waters and restoring impaired ones. (For the complete text of the Clean Water Act, see [www.epa.gov/region5/water/pdf/ecwa.pdf](http://www.epa.gov/region5/water/pdf/ecwa.pdf).)

In particular, CWA Section 404 might apply to AIS rapid response or control activities. Section 404, which regulates the discharge of dredged or fill material, might apply to AIS eradication activities that involve moving dirt or placing materials into the waters of the United States.

***“Waters of the United States”*** means:

- navigable-in-fact waters
- waters subject to the ebb and flow of the tide
- interstate waters and wetlands
- all other waters, such as interstate lakes and streams, the use, destruction, or degradation of which could affect interstate commerce
- impoundments of waters of the United States
- tributaries of above waters
- territorial seas
- wetlands adjacent to above waters

See 40 CFR 230.3(s) ([www.access.gpo.gov/nara/cfr/waisidx\\_04/40cfr230\\_04.html](http://www.access.gpo.gov/nara/cfr/waisidx_04/40cfr230_04.html)) for precise regulatory definition. Updates and background information regarding the scope of “waters of the United States” protected under the CWA can be found at [www.epa.gov/owow/wetlands/guidance/SWANCC](http://www.epa.gov/owow/wetlands/guidance/SWANCC).

***“Pollutant”*** means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.

***“Point source”*** means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

## CWA Section 402—The National Pollutant Discharge Elimination System (NPDES)

### *What is CWA Section 402?*

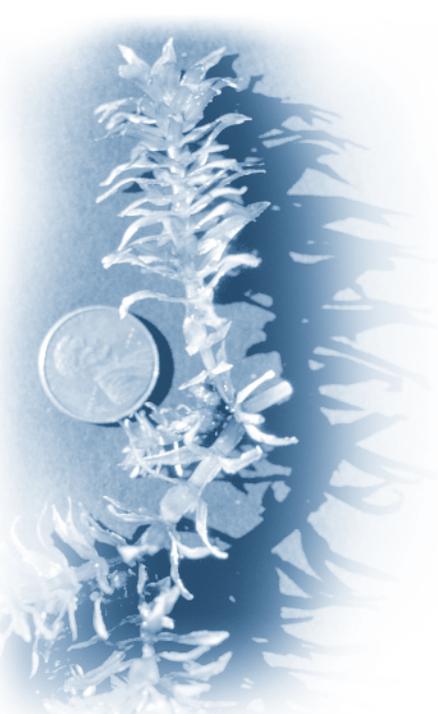
CWA Section 402 establishes the NPDES permit program to regulate point source discharges of pollutants into waters of the United States. An NPDES permit sets specific discharge limits for point sources discharging pollutants into waters of the United States and establishes monitoring and reporting requirements, as well as special conditions. (For more information about the NPDES permit program, see <http://cfpub.epa.gov/npdes>.)

EPA is charged with administering the NPDES permit program, but can authorize states to assume many of the permitting, administrative, and enforcement responsibilities of the NPDES permit program. Authorized states are prohibited from adopting standards that are less stringent than those established under the Federal NPDES permit program, but may adopt or enforce standards that are more stringent than the Federal standards if allowed under state law. At the time of publication, 45 states and the Virgin Islands have assumed NPDES authority.<sup>2</sup> (See <http://cfpub.epa.gov/npdes/statestats.cfm> for a list of states with full or partial NPDES authority and [http://cfpub.epa.gov/npdes/contacts.cfm?program\\_id=45&type=STATE](http://cfpub.epa.gov/npdes/contacts.cfm?program_id=45&type=STATE) for contact information for state NPDES authorities.)

### *Does CWA Section 402 apply to AIS rapid response or control actions?*

An interpretive statement issued by EPA in January 2005 stated that the application of a pesticide to waters of the United States consistent with all relevant requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does **not** constitute the discharge of a pollutant (and consequently does **not** require a Federal NPDES permit) in the following two circumstances:

- the application of pesticides directly to waters of the United States to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in the waters of the United States.
- the application of pesticides to control pests that are present over waters of the United States, including near such waters; that results in a portion of the pesticides being deposited to those waters, for example, the aerial application of pesticides to waters of the United States. Examples include aerial applications of insecticides to a forest canopy where waters of the United States may be present below the



*Hydrilla verticillata*

<sup>2</sup> At the time of publication, the only states that have not assumed either full or partial NPDES authority are Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico.

canopy, or applications of pesticides over or near water for control of adult mosquitoes or other pests.

EPA notes that the application of a pesticide in violation of FIFRA is not covered by the interpretive statement, and the applicator is subject to enforcement actions under any and all appropriate authorities including, but not limited to, FIFRA and CWA. EPA has proposed incorporating the 2005 interpretive statement into regulations. Further information can be found at 70 Fed. Reg. 5093 (February 1, 2005) [www.epa.gov/fedrgstr/EPA-PEST/2005/February/Day-01/p1868.htm](http://www.epa.gov/fedrgstr/EPA-PEST/2005/February/Day-01/p1868.htm).

For more information about FIFRA and FIFRA compliance, see the FIFRA Section of this document, the EPA Pesticide Registration Program website [www.epa.gov/pesticides/factsheets/registration.htm](http://www.epa.gov/pesticides/factsheets/registration.htm), or the National Pesticide Information Center website <http://npic.orst.edu/brochure.pdf>.



Common water hyacinth  
*Eichhornia crassipes*

## CWA Section 404—Permits to Discharge Dredged or Fill Material

### *What is CWA Section 404?*

CWA Section 404 establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Responsibility for administering and enforcing Section 404 is shared by the U.S. Army Corps of Engineers (USACE) and EPA. USACE administers the day-to-day program, including individual permit decisions and jurisdictional determinations; develops policy and guidance; and enforces Section 404 provisions. EPA develops and interprets environmental criteria used in evaluating permit applications, identifies activities that are exempt from permitting, reviews/comments on individual permit applications, enforces Section 404 provisions, and has authority to veto USACE permit decisions. (See [www.epa.gov/owow/wetlands/facts/fact10.html](http://www.epa.gov/owow/wetlands/facts/fact10.html) for additional information about CWA Section 404, and [www.usace.army.mil/inet/functions/cw/cecwo/reg/index.htm](http://www.usace.army.mil/inet/functions/cw/cecwo/reg/index.htm) for additional information about the USACE Regulatory Program.)

With EPA approval and oversight, states and tribes can assume administration of the Section 404 permit program in certain “nonnavigable” waters within their jurisdiction. At the time of publication, only Michigan and New Jersey have done this. In those two states, USACE retains jurisdiction in tidal and navigable waters and their adjacent wetlands.



Wetland nightshade  
*Solanum tampicense*

## ***When does CWA Section 404 apply to AIS rapid response or control actions?***

It is possible that some mechanical/physical AIS rapid response and control methods, such as the mechanized clearing of riparian areas to remove AIS or dumping of fill material to smother AIS, might require Federal or state Section 404 permits. EPA and USACE have issued a rule stating that they regard the use of mechanized earth-moving equipment to conduct activities in waters of the United States (e.g. land clearing, ditching, channelization, and in-stream mining) as regulated discharge of dredged or fill material under Section 404 unless project-specific evidence shows otherwise.

USACE regulatory program management and administration is focused at the District office level, with policy oversight at higher levels. District Engineers are authorized to issue permits, including standard permits, letters of permission, and regional general permits. Division Engineers may also issue permits under certain circumstances. USACE also issues nationwide permits that authorize certain activities that result in minimal adverse environmental effects. Natural resource managers should consult the appropriate USACE District office when planning AIS rapid response or control actions to determine if these actions require a Federal Section 404 permit. (See [www.usace.army.mil/inet/functions/cw/cecwo/reg/district1.htm](http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district1.htm) for contact information for USACE District offices.) In Michigan and New Jersey, natural resource managers should also consult their state Section 404 authorities when planning AIS rapid response or control actions to determine if these actions require a state Section 404 permit.

## ***How do I apply for a CWA Section 404 permit?***

There are several ways in which activities requiring Section 404 permits can be authorized:

- Standard permits can be issued in situations where, after a public notice and comment period, the USACE District Engineer determines that the proposed activity is not contrary to the public interest. USACE issues a public notice within 15 days of receiving a completed permit application. The public notice describes the proposed activity, its location, and potential environmental impacts and invites comments within a specified time period, typically 15 to 30 days. The public at large, as well as interested Federal, state, and local agencies, have an opportunity to comment on the proposed activity.
- Letters of permission can be issued in situations where the USACE District Engineer determines the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and will not encounter appreciable opposition. Concerned fish and wildlife agencies and, typically, adjacent property owners who might be affected by the proposal are notified, but the public at



Round goby  
*Negobius melanostomus*

large is not. Section 404 letters of permission can be issued only in cases where, after consulting with certain Federal and state agencies, the USACE District Engineer has previously approved categories of activities that can be authorized by letter of permission procedures. Requesting a letter of permission may be an appropriate and relatively expedient means of complying with Section 404 for many relatively localized and non-controversial AIS rapid response or control actions that require Section 404 compliance.

- General permits are often issued by USACE for categories of activities that are similar in nature and would have only minimal individual or cumulative adverse environmental effects. General permits can be issued on a nationwide (“nationwide permit”) or regional (“regional general permit”) basis. A general permit can also be issued on a programmatic basis (“programmatic general permit”) to avoid duplication of permits for state, local or other Federal agency programs. The mechanized clearing of riparian areas for the control of invasive species may be authorized by a nationwide permit, but the appropriate USACE District office should be contacted to determine if a nationwide permit can be used to authorize a specific activity. In some USACE Districts, nationwide permits have been suspended or revoked, and Section 404 standard permits, letters of permission, regional general permits, or programmatic general permits are used instead.

In general, to obtain a Section 404 permit, applicants must demonstrate that the discharge of dredged or fill material would not significantly degrade the nation’s waters and there are no practicable alternatives less damaging to the aquatic environment. Applicants should also describe steps taken to minimize impacts to water bodies and wetlands and provide appropriate and practicable mitigation, such as restoring or creating wetlands, for any remaining, unavoidable impacts. Permits will not be granted for proposals that are found to be contrary to the public interest. In the case of AIS rapid response or control actions, the removal of AIS or mitigation of their harmful effects could be considered a benefit of the action. Compliance with the Endangered Species Act and/or Section 106 of the National Historic Preservation Act may also be required before a Section 404 permit can be issued.

On average, individual permit decisions (standard permits and letters of permission) are made within 2 to 6 months from receipt of a completed application. For activities authorized by general permits, decisions are usually made in less than 30 days. In emergencies, USACE may be able to expedite the permitting process. Natural resource managers considering AIS rapid response actions should contact their District Engineer to discuss the circumstances and request use of expedited procedures. Expedited procedures are authorized on a case-by-case basis. Permit applications that require the preparation of an Environmental Impact Statement take an average of 3 years to process.



Purple loosestrife  
*Lythrum salicaria*